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No. 82-41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION,

Petitioner

v.

STEERE TANK LINES, INC., *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT STEERE TANK LINES, INC. IN OPPOSITION

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STATEMENT

In January 1981, The Maxwell Co., pursuant to restriction removal regulations of the Interstate Commerce Commission,[1] filed an application seeking to expand the scope of one

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[1]The Commission's restriction removal regulations, codified at 49 C.F.R. Part 1137 *et seq.*, purported to implement the Motor Carrier Act of 1980. Pub. L. No. 96-296, 94 Stat. 793, 796-97, codified at 49 U.S.C. (Supp. IV) 10922(h). Those regulations, however, were overturned by another panel of the Fifth Circuit court of appeals which found that asserted guidelines were in fact binding rules which exceeded the Commission's statutory authority. *American Trucking Associations, Inc. v. ICC*, 659 F.2d 452 (5th Cir. 1981) (the "ATA case"). Subsequently, that court issued a writ of mandamus to enforce its prior final opinion. *American Trucking Associations, Inc. v. ICC*, 669 F.2d 957 (5th Cir. 1982), pending on petition for a writ of certiorari as *Interstate Commerce Commission v. American Trucking Associations, Inc., et al.*, No. 82-86 (filed on July 9, 1982).

of its existing certificates of public convenience and necessity. Maxwell's original certificate allowed it to transport a single commodity, spent silica gel catalyst in bulk, between portions of 23 states with certain major restrictions. Relying solely on the Commission's regulations, Maxwell sought to broaden this certificate to authorize the transportation of all commodities in bulk between points in 23 states.[2]

The Commission, over timely objections concerning the reasonableness of the proposed expansion, granted the application based only upon its restriction removal regulations which were on appeal in *ATA* (Pet. App. 11a-12a). An administrative appeal by Steere was to no avail (Pet. App. 15a).

The court of appeals remanded for reconsideration in light of its prior decision in the *ATA* case (Pet. App. 6a). It held that the Commission had erroneously relied only on rules previously invalidated in *ATA* (Pet. App. 3a). Specifically, the Court found that to broaden "spent silica gel catalyst" to "commodities in bulk" was unreasonable because "[t]he record contains no evidence to support a conclusion that the carrier is 'fit, willing, and able to provide the transportation authorized by the certificate'" (Pet. App. 6a). However, the court refused to substitute its judgment for the Commission's as to what the ultimate grant of authority should be (Pet. App. 6a).

The decision of the court of appeals is correct and plenary review by this Court is not warranted.

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[2]The only relevant issue in the case is that of commodity expansion. The applicable Commission rule, 49 C.F.R. 1137.21(b), required Maxwell to replace its one named commodity with "a broader class description generally accepted by the Commission, such as commodities in bulk. . . ." *See* Pet. App. 34a-35a.

ARGUMENT

1. Underlying the Commission's petition is its contention that the court of appeals erred in requiring the agency to make findings in this case that the applicant is fit, willing, and able to perform the proposed service (Pet. 7-12). This issue is not subject to review. The holding that the Interstate Commerce Act requires such findings in restriction removal applications was settled in the *ATA* case. *American Trucking Associations, supra*, 659 F.2d at 464.[3]

Plainly, the Commission's attempt to litigate this issue in this case is nothing more than an impermissible collateral attack on the *ATA* case. This Court has consistently recognized that a court should refuse to review an issue framed in an attempt to overturn a previous conclusive judgment on the same issue. *Allen v. McCurry*, —U.S.—, 101 S.Ct. 411, 414-15 (1980); *Montana v. United States*, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326 n.5 (1979). The Commission's rights on this issue were determined at the time the court of appeals decided *ATA*, and thus the agency was required to seek further review of that decision if it desired to urge any error. *See United States v. Hancock Truck Lines*, 324 U.S. 774, 778-80 (1945).

Moreover, the court of appeals was entitled to rely upon the finality of its original decision in *ATA* in reaching its

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[3] As fully developed in the Brief for Respondents in Opposition in No. 82-86 (filed on August 16, 1982), in which Steere joined, the ATA opinion at 659 F.2d 452 is not subject to review pursuant to 28 U.S.C. 2101(c) because the Commission failed to file a timely petition seeking certiorari. Given the Commission's failure, it is inappropriate to consolidate this case with No. 82-86 (Pet. 15, n.7), as such action would permit the agency to achieve indirectly what it may not do directly.

subsequent decisions in this case. In both the remand decision and denial of rehearing by the court, it clearly was aware that the Commission's time for seeking further review of *ATA* had expired. Sound judicial policy demands that a court of appeals should follow established precedent, especially that within its own circuit. *Montana, supra*, 440 U.S. at 153-54.

2. The only other contention raised by the Commission is that the court of appeals improperly substituted its judgment for the agency's as to what constitutes a reasonable broadening of certificates under the statute (Pet. 12-14). The lower court considered *only* the record before it. In so doing, it concluded that the "record contains no evidence" to show that Maxwell had made "a prima facie showing in its application that it is fit, willing, and able" to transport all bulk commodities (Pet. App. 6a). Thus, contrary to the Commission's assertion, the court of appeals did not broaden its original decision in the *ATA* case, but simply followed it. *Compare American Trucking Associations, supra*, 659 F.2d at 464.[4]

The Commission deliberately misreads the court's decision by asserting that expansion from one commodity to all commodities within a broad description is foreclosed "as a matter of law" (Pet. 13). As demonstrated by the remand of Maxwell's application, the court expressly left for the Commission's determination what factual showing of fitness, willingness, and ability is necessary to support the ultimate grant

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[4]Moreover, there is consistency in the circuits which have considered the reasonableness of Commission actions permitting broadening of commodity descriptions. *Ritter Transportation, Inc. v. ICC*, No. 81-2116 (D.C. Cir., decision dated July 27, 1982) (Resp. App. 1a-5a).

of authority (Pet. App. 6a). Consequently, the court of appeals has not in any manner infringed upon the Commission's discretion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST 1982.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2116

RITTER TRANSPORTATION, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

PORT NORRIS EXPRESS CO., INC., INTERVENOR

Petition for Review of an Order of the
Interstate Commerce Commission

Argued May 21, 1982

Decided July 27, 1982

Michael D. Bromley with whom *Chester A. Zyblut* was on the brief, for petitioner.

Colleen J. Bombardier, Attorney, Interstate Commerce Commission, with whom *Robert S. Burk*, Acting General Counsel, and *Henri F. Rush*, Associate General Counsel, Interstate Commerce Commission, were on the brief, for

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

respondents. *John Broadley*, Attorney, Interstate Commerce Commission also entered an appearance for respondent Interstate Commerce Commission. *Robert B. Nicholson* and *George Edelstein*, Attorneys, Department of Justice, entered appearances for respondent United States of America.

William P. Jackson, Jr. was on the brief, for intervenor.

Before: EDWARDS and GINSBURG, *Circuit Judges*, and JAMESON,* *Senior District Judge* for the District of Montana.

Opinion for the Court filed by *Senior District Judge* JAMESON.

JAMESON, *Senior District Judge:* Ritter Transportation Inc. seeks to review and set aside a decision of the Interstate Commerce Commission granting the application of Port Norris Express Co. Inc. to broaden the commodities authorized in its certificate of public convenience and necessity. A certificate issued in 1973 authorized Fort Norris to transport "cullet in bulk" (broken glass) between points in 12 states and the District of Columbia. Following the enactment of the Motor Carrier Act of 1980, Pub. L. 96-296, 94 Stat. 793 (1980), the ICC, pursuant to the Act and rules and guidelines promulgated by the Commission, granted Port Norris' application to broaden its authority to "commodities in bulk". Ritter contends, *inter alia*, that the Commission arbitrarily failed to consider whether Port Norris is "fit, willing, and able" to transport "commodities in bulk". For the reasons set forth below we vacate the ICC's order granting Port Norris' application and remand to the Commission for further proceedings.

The Motor Carrier Act of 1980 requires the Commission to implement, by regulation, procedures to process removal of operating restrictions in order to . . . *reasonably broaden* the categories of property authorized by the carrier's certificate or permit. . . ." 49 U.S.C.A. § 10922(h) (1) (B) (i)

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*Sitting by designation pursuant to 28 U.S.C. § 294(d).

(West. Supp. 1981) (emphasis added). However, as noted by the Fifth Circuit Court of Appeals,

> In mandating the removal of unreasonable restrictions, the statute does not dispense with the [Act's] primary requirement that every carrier be "fit, willing and able to provide the transportation to be authorized by the certificate." [42 U.S.C.A. § 10922(a)(1)(A) (West Supp. 1981)].

American Trucking Associations, Inc. v. I.C.C., 659 F.2d 452, 464 (5 Cir. 1981).

In *Steere Tank Lines, Inc. v. I.C.C.*, 666 F.2d 255 (5 Cir. 1982) *("Steere I")*, the court reviewed an ICC decision involving the identical question here presented.[1] The court concluded:

> We believe that an applicant for removal of a restriction should be required to make a prima facie showing in its application that it is fit, willing and able to provide the transportation for which it is seeking authorization. We do not suggest that such a showing must be elaborate. What form that showing should take and how detailed it should be are, in the first instance, matters that should be addressed by the Interstate Commerce Commission.

Id. at 258. Because the applicant had made no such showing, the case was remanded for reconsideration in the light of *American Trucking Associations.*[2]

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[1]The Commission recognizes that the facts in *Steere I* "are substantially similar to the facts in this case," but argues that the Steere decision "imposes an unreasonable burden upon applicants for restriction removal."

[2]The same question was raised in *Steere Tank Lines, Inc. v. I.C.C.*, 667 F.2d 490 (5th Cir. 1982) *("Steere II")*. Again recognizing the necessity of finding an applicant "fit, willing, and able" to provide expanded service, the case was dismissed as moot after the ICC granted a new certificate in which the applicant was determined to be "fit, and able" to provide bulk service in separate proceedings on the new application.

We agree with the Fifth Circuit that the Motor Carrier Act of 1980 did not repeal *sub silentio* § 10922(a)(1)(A)'s requirement that an applicant be found "fit, willing, and able to provide the transportation for which it is seeking authorization." *Steere I, supra.* The term "reasonably broaden", as used in § 10922(h)(1)(B)(i), includes a consideration of whether the applicant is "fit, willing, and able."

The Commission properly noted that the scope of review is whether the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . .," 5 U.S.C. § 706(2)(A). We recognize that under this standard the scope of review is a narrow one. The reviewing court "must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). "[A] finding that a decision is not 'arbitrary or capricious' clearly must rest upon a corollary finding that the relevant factors upon which the decision is assertedly based are supported by some evidence. . . ." *Doe v. Hampton*, 566 F.2d 265, 271 n. 15 (D.C. Cir. 1977).

Although Port Norris' application detailed how expansion of its authority would conserve energy resources, improve efficiency, and increase both competition and revenues, no where does it indicate that Port Norris is "fit, willing, and able to provide the transportation authorized by the certificate." The ICC's decision to grant the application is likewise void of any consideration of these "relevant factors". Absent such a consideration, it cannot be said that the ICC "*reasonably* broadened" the categories of property authorized by the applicant's certificate. Its decision was arbitrary because the Commission failed to consider the relevant factor of whether the applicant was "fit, willing, and able" to perform the expanded service.

We agree also with the holding in *Steere I, supra*, that the showing that an applicant is fit, willing, and able "need not

be elaborate" and that the form and details of the showing "are, in the first instance matters that should be addressed to the Interstate Commerce Commission." Specifically, the time restraints of the Act contemplate the use of expedited procedures in restriction removal cases. *American Trucking Associations*, 659 F.2d 461.[3] The ICC retains broad discretion, within statutory limits, to define appropriate commodity categories. *Id.* at 464-65. Likewise, it has discretion in determining what facilities and equipment may be required.[4]

We vacate the order under review and remand to the Interstate Commerce Commission for further proceedings consistent with this opinion.

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[3]The Commission correctly notes that "Congress did not intend to invoke the full panoply of APA formal hearing requirements" and that the APA does not "require full-fledged adversary-type hearings in restriction removal cases."

[4]We agree with the Commission that an applicant should not "be compelled to buy all equipment necessary to transport every conceivable commodity encompassed by the expanded authority before the applicant even receives the authority it seeks."